IN THE

Supreme Court of the United States

October Term, 1956.

No. 284

GEORGE J. SCHAEFER,

Petitioner,

vs.

MILTON L. GUNZBURG, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner George J. Schaefer respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division; which judgment was entered in favor of defendants and against plaintiff in an action for damages and an accounting of profits based upon the repudiation by defendants of a partnership agreement with plaintiff-petitioner, the latter's timely demand for jury trial having been stricken upon motion of defendants.

Statement of Jurisdiction.

1. The opinion of the United States Court of Appeals for the Ninth Circuit, announcing the judgment of which review is here sought, has not yet been officially reported. The opinion of the Court of Appeals appears in the Transcript of the Record below at pages 1825-1832, and a copy thereof is appended to this Petition. The judgment of said Court of Appeals appears at page 1833 of said Transcript of Record.

2. The judgment here sought to be reviewed was dated and entered April 26, 1957.

3. The jurisdiction of this Honorable Court to review the judgment below is believed to be conferred by the provisions of Section 1254, subdivision 1, of Title 28, *U. S. Code*.

Question Presented.

Did the Court of Appeals for the Ninth Circuit improperly deny to petitioner the right to trial by jury guaranteed to him by the Seventh Amendment to the United States Constitution and by Rule 38(a) of the Federal Rules of Civil Procedure, in holding that the District Court properly struck his timely demand for jury trial where the Complaint presented his claims to legal relief for damages and lost profits arising out of the wrongful repudiation of a partnership relation between him and respondents; said holding being premised expressly upon the ground that the joinder of these claims with prayers for equitable relief in the nature of dissolution,

receivership and injunctive relief imparted an equitable nature to the action as a whole, notwithstanding the concededly legal nature of the issues raised by the demand for money damages and lost profits?

Constitutional and Statutory Provisions Involved.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Amendment VII.

"The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Federal Rules of Civil Procedure, Rule 38(a).

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the Court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Federal Rules of Civil Procedure, Rule 39(a).

Statement of the Case.

The question here presented, as the parties agree and as the Court of Appeals specifically held [R. 1826, 1832],[1] must be determined from the allegations of petitioner's Complaint herein. Examining that Complaint *as a whole*, the Court of Appeals concluded that it pleaded a case in equity from "the whole tenor of the document" [R. 1827], and accordingly sustained the action of the District Court in denying petitioner's demand for jury trial. In so ruling, we contend and shall demonstrate, the Court of Appeals misconstrued the effect of the Federal Rules upon the allegations of the Complaint, which raised and pleaded legal issues of a substantial and independent nature, and the effect thereof upon the right of petitioner to the jury trial demanded by him. Since the propriety of the judgment below rests upon the case made by the allegations of the Complaint, it is to the case there made that our attention must be channeled.

1. The Complaint pleaded, and the District Court found in accordance therewith [R. 101-102], the existence of federal jurisdiction under Title 28, *U. S. Code*, Section 1332(a)(1): petitioner being a citizen of New York, and respondents being citizens of California and California corporations, and the amount in controversy exceeding $3,000.00. [R. 304.]

2. Respondent Milton L. Gunzburg (who was the principal defendant below, and who will hereinafter for convenience be referred to as "Gunzburg"), had acquired certain rights in and to an illusionary system of photog-

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[1] This and all succeeding references to numbered pages of the certified record herein will be shown as [R.].

raphy for motion pictures designed to create the impression on motion picture screens of depth, as well as height and width, commonly referred to as the "3-D process." [R. 7-8.]

3. On or about April 20, 1951, petitioner and Gunzburg agreed to and did form a partnership for the purpose of exploiting and developing the 3-D process and incidental and related lines of business, petitioner's contribution thereto to consist of the performance of his personal services in connection with the advertising, promotion and exploitation of the process.[2] [R. 8-10.] It was agreed that plaintiff and Gunzburg would share equally in the net profits of the enterprise, if any, remaining after the payment to other persons of shares previously promised them by Gunzburg, the aggregate of such shares to other persons not to exceed 50%. [R. 10-11.]

4. Petitioner, in various manners described in detail in his Complaint, duly and fully performed his obligations under the aforesaid agreement with Gunzburg. [R. 12-16.] Largely through the efforts of petitioner, the partnership enterprise became an extremely successful one, and earned and received huge monetary benefits and profits from the exploitation of the 3-D process. [R. 16-17.]

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[2]Although the Complaint alleged a partnership between respondent and Gunzburg, it is readily apparent from the allegations thereof that the relationship thus created was not that of a technical "partnership," but was in fact a joint venture or a contractual relationship under which respondent rendered personal services to Gunzburg in return for a share of the latter's profits. It is, of course, settled law that the conclusion of the pleader that a "partnership" was created is of no consequence if pleading and proof justify recovery on a theory of joint venture or employer-employee relationship. [*Nelson v. Abraham*, 29 Cal. 2d 745, 750-751, 177 P. 2d 931; *Champagne v. Passons*, 95 Cal. App. 15, 29, 272 Pac. 353.]

5. Gunzburg thereupon breached the partnership agreement between himself and petitioner by refusing and declining to perform his obligations thereunder. [R. 25-34.] Specifically, the breaches of contract of which petitioner complained were specified as follows:

(a) Gunzburg denied that petitioner was or ever had been his partner or that petitioner had ever had any interest in the partnership enterprise, and repudiated the existence of the partnership. [R. 28.]

(b) Gunzburg excluded petitioner from all participation in the conduct of the partnership business and arregated to himself and to his co-defendants, with the conspiracy and connivance of the latter, the management and control of said partnership business, [R. 28-30.]

(c) Gunzburg secretly, and with intent to defraud and deprive petitioner thereof, diverted the partnership profits and assets to himself and to his co-defendants. [R. 30-33.]

(d) Gunzburg, with the conspiracy and connivance of his co-defendants, withheld and converted all of the partnership assets and profits, refusing to account to petitioner therefor, and refusing to pay to petitioner his rightful or any share thereof. [R. 33-34.]

6. Petitioner prayed for a variety of forms of relief, both of a legal and an equitable nature. He prayed for a declaration that he was in fact a partner in, and entitled to share equally in the profits of, the partnership business, and in the stock of allied corporations formed by Gunzburg [R. 34-36]; for a decree that the partnership *was* dissolved by the acts of Gunzburg and that certain allied corporations *be* dissolved [R. 36-37]; *for an ac-*

counting by Gunzburg of all assets and profits, past and future, wrongfully converted by him and his co-defendants [R. 37]; *for judgment for the share of the profits thus found to be due and payable to petitioner, with interest* [R. 38]; *for money damages in the sum of $3,500,000.00* [R. 39]; and for relief pending trial in the form of an injunction against disposal of assets and the appointment of a receiver. [R. 39.]

7. Petitioner endorsed upon his Complaint a demand for trial by jury. [R. 40.]

Respondents filed and noticed a series of motions, including a motion to strike the demand for jury trial on the ground that the claim alleged in the Complaint "is cognizable and remedial in equity." [R. 41.] The motion was vigorously opposed by petitioner, but was granted by the District Court. [R. 56.]

Thereafter, petitioner filed an Amended Complaint which, the Court of Appeals recognized [R. 1832], merely clarified but did not change the issues tendered by the Complaint, to which pleading respondents filed their answer.

Obedient to the order of the District Court for a non-jury trial of the cause, the parties proceeded to trial without a jury. The evidence, adduced at a three-week trial and consisting of approximately 1700 pages of oral testimony and 144 written exhibits, many of them being multiple exhibits, was directly in conflict upon virtually all of the pertinent factual issues tendered by the pleadings. The District Court ultimately resolved that conflict in favor of respondents, finding that petitioner and Gunzburg had never entered into an agreement to form a partnership or to share the profits derived from the

exploitation of the 3-D process, and that their only agreement contemplated the securing by petitioner of certain specific results upon which his compensation was contingent and which results were not secured.[3] [R. 100-109.] Judgment was accordingly entered for respondents [R. 110-111], and petitioner filed timely notice of appeal to the Court of Appeals for the Ninth Circuit. [R. 111-112.]

11. The judgment was affirmed by the Court of Appeals (James Alger Fee, Circuit Judge) upon the stated ground that the Complaint, viewed as a whole, appeared to be "in the form and style of a code bill in equity" [R. 1827], as to which petitioner was not entitled to a jury trial. The Court of Appeals made no effort, despite petitioner's premise of his entire appeal thereon, to determine whether legal as well as equitable *issues* were pleaded by petitioner (in which case a jury trial would have been required upon such legal issues), but instead limited itself to a characterization, which it conceded was an "abstruse and technical" one [R. 1827], of the *action* as being one in equity.

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[3]The sole question here presented for review is whether the Court of Appeals erred in ruling that the District Court properly denied petitioner a jury trial upon timely demand therefor. That is the only question which the Court of Appeals decided. Concededly (although the Court of Appeals appears to have accepted that view most reluctantly [see R. 1825-1826, 1831-1832]), if petitioner were entitled to a jury trial the error in its denial could not be cured by the actual conduct of a non-jury trial. Since the resolution of that question depends solely upon the nature of the issues raised by the pleadings and is not affected by the nature or content of the evidence adduced at the court trial to which petitioner was compelled to submit, we have not seen fit to prolong this Petition unduly by a detailed summary of evidence not pertinent to the issues raised.

It is to review the error implicit both in the nature of the inquiry made by the Court of Appeals and in the conclusion derived by it therefrom that this petition is here presented.

Summary of Argument.

We are wholly cognizant of the stringent considerations which govern the selective exercise by this Court of its jurisdiction on petition for certiorari [U. S. S. C. Revised Rules (1954), Rule 19]; but we are confident that the presence of these considerations here appears with compelling clarity. The manner in which the considerations commending the granting of the writ here arise, and the special and important reasons justifying its granting in the case at bar, may be briefly demonstrated:

Petitioner's Complaint here alleged specifically an agreement to form a partnership and his performance of his obligations thereunder; the repudiation of the partnership, the denial of its existence, and the exclusion of petitioner from its operation, by the conspiratorial acts of the respondents; and the conversion by respondents of petitioner's rightful share of the partnership assets and profits. It prayed for damages for the wrongful dissolution of the partnership and for plaintiff's rightful share of past and future profits, to be determined by an accounting thereof. The claim or cause of action thus asserted is one which can be properly sued upon in an action at law. [Point I, *infra*.]

The nature of the claim above summarized was not altered, nor was petitioner's right to a jury trial thereon waived by his joinder of the aforementioned claim with concurrent prayers for equitable relief. Rule 18(a) of the Federal Rules of Civil Procedure permits such joinder in all cases and required it in the case at bar. Such joinder of legal and equitable claims in a single action is not a waiver of the plaintiff's right to a jury trial upon the legal claims, nor does it justify a District Court in striking a timely demand therefor. The decision of the Court of Appeals to the contrary in the case at bar is in direct conflict with the rule to which the courts of all other Circuits have consistently adhered. [Point II, *infra.*]

Recognizing that petitioner could and did plead a legal claim to relief upon the facts alleged, the Court of Appeals rested its affirmance of the order in question upon the ground that, *viewed as a whole*, the Complaint appeared to present an action that was more equitable than legal, and that the denial of a jury trial was properly premised upon a characterization of the whole action, rather than of the issues it presented. The test thus adopted here by the Court of Appeals is one that has been rejected by the courts of all other Circuits, which have held that the granting or denial of a jury trial depends upon whether *any* of the *issues* presented are legal, and not upon a labeling of the action as a whole as one at law or in equity. [Point III, *infra.*]

The conflict among the Circuits thus presented is emphasized by the fact that the matter at stake here is one of constitutional right upon which this Court has not heretofore ruled authoritatively. To resolve the conflict upon so crucial an issue, certiorari should be granted.

ARGUMENT.

I.

An Action by a Partner Against His Copartner and Others for Damages and an Accounting of Profits by Reason of the Wrongful Dissolution of the Partnership and the Conversion of Its Assets and Profits Is to That Extent an Action at Law, to Which a Jury Trial May Be Had as of Right.

The motion to strike the jury demand in the District Court was made and apparently granted upon the assumption that, the Complaint pleading an action between partners, the action was necessarily and unfailingly an equitable one, as to which a jury trial was not permitted. [R. 41, 46-47:] While, *generally*, actions between partners are equitable in nature, nevertheless there are certain well-defined areas of exception in which the conduct of one partner toward another will support an action at law, in respect of the partnership business and assets, brought by the wronged partner. Demonstrably, portions of petitioner's action come within these areas.

The remission of a partner to an action in equity against his copartner depends upon the existence of an accepted and continuing partnership between the parties, which existence is not questioned or disputed; in which the action is brought to redress the wrongful acts of one partner in connection with *the operation and conduct of an acknowledged partnership*. The rule does not apply, however, where the pleaded basis of the action is the repudiation and denial of the formation or existence of the partnership by the defendant and his refusal to recognize the plaintiff's interest therein or in the profits and proceeds therefrom. In such case, *an action at law* may be maintained to recover the profits, past and future, of

which the plaintiff has been deprived. [*Zimmerman v. Harding*, 227 U. S. 489, 494-495; *Laughlin v. Haberfelde*, 72 Cal. App. 140, 143, 273 Pac. 847; *Johnstone v. Morris*, 210 Cal. 580, 586, 292 Pac. 970.][4]

An action at law may similarly be maintained for damages for wrongful dissolution of the partnership by the defendant; for conversion by the defendant of partnership assets and profits; and, where a partnership or joint venture has been terminated rightly *or* wrongfully, for the plaintiff's proper share of partnership assets and profits. [*Zimmerman v. Harding, supra*, 227 U. S. at 494-495; *Karrick v. Hannaman*, 168 U. S. 328, 337; *Wilson v. Brown*, 96 Cal. App. 140, 143, 273 Pac. 847; *Moropaulos v. Fuller*, 186 Cal. 679, 200 Pac. 601; *Barlin v. Barlin*, 145 Cal. App. 2d ..... (145 A. C. A. 456, 459-460), 302 P. 2d 457; *Elsbach v. Mulligan*, 58 Cal. App. 2d 354, 369-370, 136 P. 2d 651; *Cases Collected*, 168 A. L. R. 1098-1099, 1106-1109.]

As stated by the California court, in holding that a money judgment could properly be obtained in an action at law for the recovery of partnership profits brought by one partner against another who had denied the existence of the partnership and converted the partnership assets and profits:

> "While the general rule [that plaintiff's only remedy is by suit in equity] is well established a different rule, or at least an exception to the general rule, has been quite generally recognized and has been indicated and applied in several cases in this state.

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[4]The present action being brought in the Southern District of California by reason of diversity of citizenship, the nature of the claims pleaded is, of course, determined by California law. [*Erie R. Co. v. Tompkins*, 304 U. S. 64, 79-80.]

The general rule is peculiarly applicable to claims for damages *arising out of the manner in which the partnership business has been conducted*, and to breaches of such agreements as such . . .

"These reasons are less forceful where the wrongful acts complained of are not only a breach of contract but constitute a tort, and this is especially true where the tort is of such a nature that it not only terminates the partnership but wrongfully destroys it, and *where the erring partner converts to his own use its entire assets* . . .

"Section 2432 of the Civil Code, adopted in 1929 as a part of the Uniform Partnership Act, recognizes this distinction by giving the innocent partner a right to damages in addition to his right to an accounting, and with no express limitation as to the form of the action in which the additional right may be enforced."

Laughlin v. Haberfelde, 72 Cal. App. 2d 780, 788-789, 165 P. 2d 544 [Emphasis added].

The pertinent allegations of petitioner's Complaint clearly brought his action within the exceptions to a rule which is less general in its application than the arguments of respondents and the opinion of the Court of Appeals appear to have found it. The Complaint did not allege a partnership whose formation and existence was acknowledged by respondents; nor did it seek simply the adjustment of the rights of the parties arising from conduct and transactions within the partnership framework, for which purpose alone the right of action lies in equity. [See, *Hadley v. Ellis*, 123 Cal. App. 2d 758, 761, 267 P. 2d 442.]

To the contrary, petitioner's Complaint specifically alleged that the existence of the partnership had been denied

by Gunzburg in breach of their agreement, and that petitioner's interest therein had been repudiated, in that Gunzburg "*denied that plaintiff had any interest as a partner*" in the enterprise "*or any title or interest in and to its assets . . . or profits,*" and that Gunzburg had, "*with the intention of cheating and defrauding plaintiff, excluded . . . plaintiff from all participation in the conduct of the business*" and "*has failed and refused to recognize the rights and interests of plaintiff as a partner.*" [R. 28-29. Emphasis added.] The Complaint further alleged that Gunzburg, with the aid of and pursuant to a conspiracy with his co-defendants (who were not partners in the enterprise) and with the intent to defraud petitioner, had converted and appropriated to his own use all of the assets and profits of the partnership, withholding same from petitioner and refusing to recognize the latter's interest therein. [R. 29-34.]

In respect of these acts, petitioner prayed for a declaration of his rights [R. 34]; for an accounting of all assets and profits wrongfully converted and withheld from petitioner by respondents [R. 37-38]; and for damages [R. 39].[5].

It is very difficult, if not impossible, to see how petitioner could more clearly have pleaded himself within the rule that an action for the repudiation of a partnership and the conversion of its assets and profits by the erring partner is *an action at law.*

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[5]Petitioner also sought other relief in respect of claims which admittedly fall within the so-called "general rule" and which are equitable in nature; which claims were properly joined with the above-mentioned claims at law, and which joinder did not effect a waiver of petitioner's right to a jury trial. [Point II, *infra.*]

The aforementioned allegations established petitioner's action in respect thereof as one for damages and profits arising out of the wrongful dissolution and termination of the partnership, the repudiation of plaintiff's interest therein, and the exclusion of plaintiff from the management and control thereof; and not merely as an action for dissolution and settlement of an existing and continuing partnership.

In *Laughlin v. Haberfelde, supra*, 72 Cal. App. 2d 780, 787-790, plaintiff alleged the formation of a partnership with defendants to perform certain manufacturing contracts; the repudiation and dissolution of the partnership by defendants; the exclusion of plaintiff from the affairs of the partnership; and defendants' appropriation and conversion of the partnership assets and profits. Plaintiff sought judgment for, among other things, his rightful share of the partnership profits. The trial court sustained a demurrer to the complaint on the ground that, as the action was between partners, plaintiff's only remedy was by suit in equity for dissolution, whereupon plaintiff appealed.

The judgment was reversed by the District Court of Appeal on the ground that plaintiff had pleaded a cause of action at law and was not limited to suit in equity for dissolution. In an exhaustive review of the California authorities, the Court concluded that the action was properly brought at law as set forth in the excerpt from the opinion quoted previously.

Similarly, in *Wilson v. Brozen*, 96 Cal. App. 140, 273 Pac. 847, wherein plaintiff alleged that defendant, her partner, had appropriated the partnership assets and profits to his own use and had denied the existence of

the partnership and of plaintiff's interest therein and in the profits therefrom, the trial court entered a personal judgment against defendant for the amount of such profits. On appeal, defendant argued that the personal judgment was improper because plaintiff's only remedy was by suit in equity for a dissolution of the partnership and settlement of the partnership accounts.

In affirming the judgment, the District Court of Appeal recognized the general rule as stated by defendant, but held that it did not apply to a cause of action arising from the repudiation of the partnership and conversion of its assets and profits, which cause of action was properly brought at law and not in equity, stating:

> "Where, as in this case, some of the partners have excluded another and have appropriated the partnership property to their own use, the latter may treat the matter as a conversion, and, without any accounting or disposition of the former partnership assets, sue the offending partners and recover against them a personal judgment in the amount of his damage." [*Wilson v. Brown*, 96 Cal. App. 140, 143.]

The Court of Appeals appeared to find considerable significance in the fact that the pleading of Gunzburg's wrongful acts was not tied specifically to the prayer for damages by a bridging allegation that these acts had caused damages in the amount prayed. [R. 1827.] The significance of the absence of such a formalistic allegation escapes us. Although such an allegation may be, as the Court of Appeals perceives it, "the traditional and accepted earmark" [R. 1827] of an action for damages, it is neither a necessary allegation thereto nor is it a part of the cause of action. Petitioner here alleged the violation of his rights by respondents and he specified the injuries sus-

tained thereby. He sought damages for these injuries. Such an allegation sufficiently states a cause of action at law without the necessity of an added allegation that the injuries sustained resulted in the monetary damages prayed. [*Hartzell v. Myall*, 115 Cal. App. 2d 670, 677-678, 252 P. 2d 676; *Kilbride v. Swafford*, 99 Cal. App. 303, 305, 278 Pac. 448.]

In such an action at law, petitioner was and is also entitled to receive his proper share of the profits of which he was thus deprived, and for which he prayed; and it is no bar to such relief in an action at law that an accounting might be required or prayed in order to determine the amount thereof. In *Zimmerman v. Harding*, 227 U. S. 489, 494-495, this Court expressly held that a partner who has been excluded from the partnership and deprived of the profits thereof by the acts of his copartner may maintain *an action at law* for his rightful share of the profits, stating:

> "Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus, if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for damages for the breach, and recover not only his interest, but also his share of the profits which might have been made during the term. *He need not wait until the expiration of the period, and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of.*" (Emphasis added.)

To the same effect is the decision of this Court in *Karrick v. Hannaman*, 168 U. S. 328, 337.

In addition to the legal remedies of damages and profits sought by petitioner, he was entitled to and did pray, in the action at law, for a declaration of his rights arising from the wrongful dissolution[6] and conversion alleged. [R. 34.] That prayer does not convert the action into an equitable one. Where, as here, the rights and remedies in respect of which declaratory relief is sought are essentially legal in character, and can be and—as in this case—are sought in an action at law, the issues in the declaratory relief action are legal and a jury trial will be accorded the litigants as a matter of right.

F. R. C. P., Rule 57;

Dickenson v. General Accident, etc. Corp., 9 Cir., 147 F. 2d 396, 397;

Pac. Indemnity Co. v. McDonald, 9 Cir., 107 F. 2d 446, 448.

In seeking to recover his share of the profits of which he was thus deprived, petitioner was not, because of lack of knowledge thereon, enabled to seek or to specify a sum certain. To the determination of those profits, he was entitled to and did pray for an accounting thereof as a basis upon which an award to him of his aliquot share could be computed. The fact that, in order to compute the amount of a judgment, an accounting of the defendants' profits is necessary and is in fact sought by specific

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[6]Although no term was specified in the agreement, the Complaint alleged the formation of the partnership for the exploitation and licensing of the three-dimension process. [R. 8-9.] It further alleged that the exploitation was continuing in the hands of the erring partner. [R. 25.] Under California law, the term of such a partnership is coextensive with the entire period of exploitation and licensing, and the prior termination thereof by less than all of the partners constitutes a wrongful and actionable dissolution. [*Owen v. Cohen*, 19 Cal. 2d 147, 150, 119 P. 2d 713; *Zeibak v. Nasser*, 12 Cal. 2d 1, 13, 82 P. 2d 375.]

prayer, does not alter the character of the action. If the right sought to be vindicated and the cause of action are assertable at law, the action is one at law even though an accounting is necessary, *and is in fact prayed,* to determine the amount to which plaintiff is entitled. [*Johnstone v. Morris*, 210 Cal. 580, 586, 292 Pac. 970; *Bell v. Bank of California*, 153 Cal. 234, 243, 94 Pac. 889; *Bendien v. Solov*, 89 Cal. App. 2d 904, 907-908, 202 P. 2d 372; *McPherson v. Great Western Milling Co.*, 44 Cal. App. 491, 493, 186 Pac. 803.]

Johnstone v. Morris, supra, is directly in point upon this issue. There plaintiff sued his partner for funds misappropriated and converted by the latter from the profits of the partnership, and recovered a money judgment *based upon a jury verdict.* On appeal, the defendant contended that the action, being between partners and being one in which an accounting as to the converted profits was required and prayed, was an action in equity as to which a jury trial was improper. The California Supreme Court affirmed the judgment on the ground that, upon the allegations of the complaint and under the principles of law described herein, the action was one at law. In respect of the effect of the necessity and prayer for an accounting, the Supreme Court said [210 Cal. at 586]:

> "It is true that respondent herein has, among other remedies, asked for an accounting, but that relief is merely incidental a part of the proof of the fraud. The essential nature of the action was for fraud and deceit in the misappropriation of funds. The action was not one for an accounting. The mere fact that in determining the damages many items were involved would in no way change the nature of the action, nor would it deprive the law courts of jurisdiction."

To a like effect is the decision of the Supreme Court of California in *Bell v. Bank of California, supra,* 153 Cal. at 242-243, in which, in an action for conversion and for an accounting of defendants' receipts and profits by reason of the conversion, the prayer for an accounting was held not to convert the action into one in equity.

It follows, then, that petitioner did plead a clearly cognizable cause of action at law. He demanded a jury trial thereof concurrently with the filing of his Complaint. Upon these facts, then, he was entitled to a jury trial as a matter of constitutional right; and the denial of that right by the District Court and the Court of Appeals is clear and reversible error, unless petitioner's right was in some manner lost or waived by his also having pleaded other claims of an equitable nature.

II.

A Partner May, Under the Federal Rules, Join in One Action Claims at Law for Damages and an Accounting of Profits Based Upon the Wrongful Dissolution and Repudiation of the Partnership With Equitable Claims for a Judicial Winding-Up and Division of Assets of the Partnership Upon Such Dissolution. Such a Joinder Nonetheless Does Not Diminish His Right to Jury Trial Upon His Claims at Law.

In respect of the relationships between partners, as in respect of so many other areas of the law, the wrongful conduct of one partner toward the other may and often does give to the other rights and remedies of various kinds which may be concurrently asserted; some of which remedies are at law and others of which are in equity. The case at bar is an illustrative example.

Gunzburg's acts and conduct in repudiating the partnership and denying its existence and petitioner's rights therein, excluding petitioner therefrom, and appropriating the partnership assets and profits to his own use, constituted a wrongful dissolution of the partnership and created in petitioner causes of action at law, which he asserted in his Complaint, for damages for wrongful dissolution and for an accounting of the profits converted by Gunzburg and his co-defendants. [Point I, *supra.*] But petitioner was not limited to or by the foregoing remedies.

Under the law of California and all other states which have adopted the Uniform Partnership Act, one partner has the *power*, although not the *right*, to dissolve the partnership by his wrongful, unilateral acts. [*Calif. Corporations Code*, §15031(2).] Dissolution in this manner gives to the partner not causing same the right to damages and an accounting of profits hereinabove described. It does not, however, terminate his rights as a partner in respect to an aliquot share of the partnership assets upon such dissolution. The innocent partner is entitled, *in addition to his claims for damages and recovery of profits*, to a judicial decree for division and application of partnership assets upon dissolution to all the partners, as their interests appear. [*Calif. Corporations Code*, §15038(1), (2) (a); *Vangel v. Vangel*, 116 Cal. App. 2d 615, 623, 254 P. 2d 919; *Gardner v. Shreve*, 89 Cal. App. 2d 804, 808, 202 P. 2d 322.] To the latter end, the innocent partner may, in addition to his legal remedies for the wrongful dissolution, seek the aid of equity for the winding-up of the partnership, for *pendente lite* orders for the protection of the interests of the parties in the

course of such winding-up, and for division of the assets to the partners upon completion thereof.

That, of course, is precisely what petitioner did here. As he had the right to do, he treated the partnership as dissolved by the wrongful acts of his co-partner, and sought both his legal remedies on account of that wrongful dissolution and his equitable remedies in respect of the partnership assets upon such dissolution.

That these two alternative remedies are not inconsistent and may in fact be asserted in the same action has been conclusively determined by this Court in *Zimmerman v. Harding, supra*, 227 U. S. 489. In that case, defendant had repudiated her partnership with plaintiff, excluded him from the management of the partnership business and converted to her own use the partnership profits. Plaintiff first brought an action at law against defendant for damages and profits; and then dismissed that action, bringing a second action in equity for dissolution and winding-up of the partnership. Upon appeal from an adverse judgment in the second action, defendant contended that the bringing of the first action constituted an election of remedies, precluding the bringing of the second action for the remedies allegedly rejected by the claimed election.

In affirming the judgment, the Supreme Court held that no election had occurred for the reason that the remedies are not inconsistent or mutually exclusive; that the wronged partner in such circumstances had both his remedy at law for damages and profits *and* his remedy in equity for judicial dissolution and winding-up of the partnership; and that the pursuit of one remedy did not preclude the concurrent pursuit of the other. [*Zimmerman v. Harding, supra*, 227 U. S. at 493-495.]

The Court of Appeals appears to have regarded the prayer of petitioner's Complaint for decree of dissolution as being somehow inconsistent with the hypothesis that the partnership had been dissolved by the antecedent acts of Gunzburg,[7] justifying it in treating petitioner's action as being wholly in equity for dissolution of the "partnership as a continuing and going concern." [R. 1827.] That ruling demonstrates a clear misconception of the office of a judicial decree of dissolution in California, which misconception appears to be the focal point of the error below.

Where, as here, a partner not causing dissolution alleges the dissolution of the partnership by the misconduct of the defendant, and seeks a decree adjudging the partnership to be dissolved, such an action *does not* presuppose the existence of the partnership as a "going concern" either at the time of the filing of the Complaint or at any other time subsequent to the misconduct asserted. "In such cases the misconduct really dissolves the partnership, the court decree merely giving legal effect thereto." [*Vangel v. Vangel*, 116 Cal. App. 2d 615, 626, 254 P. 2d 919;] Such a decree is necessary to the judicial supervision of the winding-up of the dissolved partnership.

Such claims for dissolution and distribution of assets are of course equitable in nature. Their joinder in the same Complaint and even in a single count of that Complaint with claims of a legal nature is permitted and en-

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[7]Even if the prayer for dissolution were inconsistent with the prayer for damages for wrongful dissolution, there is no prohibition against the pleading of inconsistent claims; nor does the alleged inconsistency justify overlooking the claims so pleaded.

couraged by Rule 18(a) of the Federal Rules of Civil Procedure.[8]

Such joinder, following the adoption of the Federal Rules, raised directly the question of the effect thereof upon the rights of the parties to a jury trial. Some state courts (the courts of California not being among them) had taken the view that the joinder of legal and equitable claims effects a consent by plaintiff to equitable jurisdiction of *all* issues and a waiver of his right to a jury trial upon his legal claims. [See, *e. g., Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993.] Such was also the view of the District Courts first to consider the question following the adoption of the Federal Rules. [*Arnstein v. Twentieth Century-Fox*, S. D. N. Y., 3 F. R. D. 58; *Young v. Loew's, Inc.*, S. D. N. Y., 2 F. R. D. 350.] Such also appears to be the view espoused by the Court of Appeals for the Ninth Circuit in the case at bar.

Elsewhere through the federal court system, however, the theory of these cases has been uniformly rejected in favor of a holding that, in the light of the clear mandate of Rule 38(a) that the right to jury trial shall be "preserved inviolate," the plaintiff must be accorded a timely demanded jury trial upon his legal claims. Thus, in *Ring v. Spina*, 2 Cir., 166 F. 2d 546, 550 *cert. den.* 335 U. S. 813, where it was claimed that plaintiff waived his right to jury trial by asserting a claim for money

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[8]Where, as here, all claims arise out of the same cause of action, the failure to join all such claims in the one action would probably effect a waiver of all claims not so joined. [*Ring v. Spina*, 2 Cir., 166 F. 2d 546, 550, fn. 3.]

damages concurrently with prayers for equitable relief, the Court of Appeals for the Second District stated:

> "Such a claim, it is well settled, is triable by jury on timely demand of a party. . . . There seems only one avenue of possible escape from the conclusion that such trial must be accorded here. That would be through acceptance of the view advanced in some state courts, notably New York, Di Menna v. Cooper & Evans Co., 220 N. Y. 391, 115 N. E. 993, that the plaintiff, by uniting legal and equitable claims, has waived his right to a jury. But this is rationally unsound and practically undesirable, if not quite improper. Rationally there is no basis upon which to ground such a waiver short of resurrecting the ancient divisions now abolished to say that plaintiff has brought his 'legal' claims into an 'equitable' cause. This is contrary to that complete union and consolidation of all claims, legal and equitable, in a single civil action which the new rules not only permit, but encourage. Practically the thesis results in forcing the plaintiff to yield his jury-trial right if all his claims are to be presented properly in the single action. Hence this conception of jury waiver has been repudiated under the federal rules."

Although this Court does not appear to have ruled upon the subject (except inconclusively through denial of certiorari in *Ring v. Spina*), the great weight of authority among the Courts of Appeals in Circuits other than the Ninth is in accord with the rule above cited. [See, *e. g.*, *Bowie v. Sorrell*, 4 Cir., 204 F. 2d 49, 51; *Reliance Life Ins. Co. v. Everglades Discount Co.*, 5 Cir., 204 F. 2d 937, 942; *Leimer v. Woods*, 8 Cir., 196 F. 2d 828, 833; *Okla. Contracting Co. v. Magnolia Pipe Line Co.*, 5 Cir., 195 F. 2d 391, 396.]

Until the decision in the case at bar, it had appeared that the Court of Appeals for the Ninth Circuit adhered to the same view. [*Bruckman v. Hollzer*, 9 Cir., 152 F. 2d 730, 732-733.] In the case at bar, however, the Court of Appeals purported to distinguish and thus disregarded its decision in *Bruckman v. Hollzer* upon the stated ground that in that case "the District Court had decided that a separate count stating a legal cause of action on that phase of the total controversy was adequate, and granted a jury trial. This Court simply affirmed the decision of the trial court." [R. 1827.]

It is difficult to ascertain wherein the quoted portion of the opinion of the Court of Appeals affords rational basis for distinguishing its previous decision in *Bruckman v. Hollzer* or for declining to adhere to the rule enunciated there and in the cases above-cited from the other Circuits.

If it is meant by the quoted statement to hold that a claim for legal relief is triable before a jury when it is made the subject of a separate count in a Complaint but is not so triable when it is included in a single count with other claims to equitable relief, such a holding is supported neither by reason nor by pertinent precedent. The determining factor in respect to a demand for jury trial is whether a claim for legal relief has been pleaded, either alone in the Complaint or concurrently with a claim or claims for equitable relief. If such a legal claim is in fact pleaded, it is a matter of no consequence whether it is pleaded in a separate count, or in a single count together with claims to equitable relief. The test is the pleading of such a claim and not its form or physical placement within the Complaint.

". . . obviously, it is without difference in this respect whether all the underlying rights involved . . . are made the subject of a single statement of claims in the complaint or of distinct counts. This is a mere form, which is without effect upon substance." [*Leimer v. Woods*, 8 Cir., 196 F. 2d 828, 833.]

No authorities to the contrary are cited in the opinion of the Court of Appeals; and we have been unable by diligent search to discover any authority furnishing support for such a distinction. Each of the authorities which appear to have considered the question have held with *Leimer v. Woods* that the distinction is immaterial. [See, *e. g., Russell v. Laurel Music Corp.*, S. D. N. Y., 104 Fed. Supp. 815, 816; *Favorite Films Corp. v. Warner Bros.*, S. D. N. Y., 13 F. R. D. 452, 453.]

Nor is *Bruckman v. Hollzer* properly to be disregarded upon the basis stated by the Court of Appeals, that in that case the District Court had *denied* a motion to strike plaintiff's demand for jury trial and that the Court of Appeals there had "*simply affirmed the decision of the trial court.*" [R. 1827. Emphasis added.] Presumably, the Court of Appeals is saying that, had the trial court in *Bruckman v. Hollzer* granted the motion to strike (upon the same Complaint there presented), the Court of Appeals would have affirmed that decision as well! *Bruckman v. Hollzer* and the present case are apparently reconciled by the Court of Appeals which decided both of them, on the ground that in the first case the trial court permitted, and in the latter case it denied, a jury trial; and the function of the Court of Appeals was in each case limited to placing its stamp of approval upon the action of the District Court.

If that is what the Court of Appeals meant to say (and the inference is inescapable that it is), then the conflict between its decision in the case at bar and the decisions of the Courts of the other Circuits heretofore cited appears with crystal clarity. The issue here is not one of grace or discretion of the trial court; it is one of constitutional right. Where, as here, a jury trial is sought as to legal issues pleaded in the complaint, the correctness of granting or denying a jury trial cannot and does not rest upon whether the trial court saw fit to grant or deny it. Rather, it rests upon whether the Complaint presents legal issues, as to which a jury trial is a matter of *right*, and not of judicial discretion. The Complaint upon which that issue must be judged is the same document before the Court of Appeals as it was before the District Court; and the question on appeal from the judgment in the District Court is not whether that court granted or denied a jury trial but whether the Complaint required the granting or the denial thereof. In holding to the contrary in the case at bar, the Court of Appeals sanctioned a rule that is squarely in conflict with the rules announced by the Courts of Appeals for the Second Circuit [*Ring v. Spina*, 166 F. 2d 546]; the Fourth Circuit [*Bowie v. Sorrell*, 204 F. 2d 49]; and the Eighth Circuit [*Leimer v. Woods*, 196 F. 2d 828.].

It follows, then, that petitioner's joinder, in a single count of his Complaint, of claims to both equitable and legal relief entitled him to a jury trial upon the legal claims therein asserted.

III.

The Court of Appeals Erred in Ruling That Petitioner's Legal Claims Did Not Entitle Him to a Jury Trial Because the "Action," Viewed as a Whole, Was Essentially Equitable. Such a Ruling Is in Square Conflict With the Overwhelming Weight of Authority in the Other Circuits.

That, as applied to the Complaint here presented, the foregoing authorities clearly supported petitioner's demand for jury trial cannot be seriously disputed. [Point II, *supra.*] The Court of Appeals did not rule that the judgment should be affirmed on the theory that petitioner had not pleaded a legal claim; for it specifically recognized that the facts pleaded could and did give rise, under California law, to a claim at law for damages and an accounting of profits as set forth in the Complaint. [R. 1830.] Nevertheless, it justified the order of the District Court upon the stated ground that the Complaint, *viewed as a single, integrated unit*, was "pleaded in the form and style of a code bill in equity." [R. 1837.]

Scarcely concealing its lack of sympathy for petitioner's appeal [see R. 1825-1826, 1832], and pursuing a process of reasoning which the court itself characterized as "abstruse and technical" [R. 1827], the Court of Appeals made no analysis of the various issues of the Complaint to ascertain whether any of the *issues*, as contrasted to the *action* presenting them, were legal in nature. Instead, the Court of Appeals concededly looked to an analysis of the Complaint as an indivisible entity, to ascertain whether, *so viewed*, the *action* was legal or equitable. Upon that analysis, the court concluded that, although the allegations hereinabove summarized [Point I, *supra*] asserted a claim to relief based upon the wrong-

ful dissolution and repudiation of the partnership by Gunzburg, ". . . the whole tenor of the document is to treat the alleged partnership as a continuing and going concern where one of the partners is concealing and secreting the assets and acquisitions from the other." [R. 1827.] So analyzed, the court reasoned: the *action* was one in equity as to which a jury trial was not available.

Insofar as the Court of Appeals found the prayer for dissolution and for the attendant division of assets to constitute an acknowledgment by petitioner of the existence of the partnership as a "continuing and going concern," the court appears to have been misled by a misconception of the nature of these remedies and by a failure to understand the basic allegations of the Complaint. Insofar as the court relied upon the admittedly equitable nature of these remedies to control the nature of the entire action, it appears equally to have misconceived the nature of the inquiry it was required to pursue.

In the first place, the nature of the cause of action asserted by petitioner must be assessed from the allegations of fact in the body of the complaint and not from the nature of the prayer. So judged, it is clear that the Complaint pleads a partnership which was brought to an end by the wrongful acts of Gunzberg and by his repudiation of its existence. It does not seek to enforce the continued existence of the partnership; but it rather seeks to enforce petitioner's rights, *both legal and equitable*, arising from its termination. To protect and enforce his interest in the partnership assets, petitioner need not and did not plead the continued existence of the partnership. Having alleged the termination of the partnership as aforesaid, petitioner's prayer for dissolution was de-

signed simply to enforce his rights arising from the dissolution already accomplished; and it did not imply any recognition of the partnership as a continuing one. This Court has specifically so held. [*Zimmerman v. Harding*, 227 U. S. 489, 493-494; *Karrick v. Hannaman*, 168 U. S. 328, 337.]

More serious, however, so far as the scrutiny of this Court is invoked, is the error of the Court of Appeals in characterizing the action as a whole as being equitable in nature, based upon the presence of concededly equitable issues and prayers for relief. This process of weighing equitable issues in a Complaint against legal issues to determine which preponderate, and then characterizing the entire action in accordance with that determination of "preponderance," is contrary to the specific command of the Federal Rules of Civil Procedure, and to the multitude of pertinent authorities from the other Circuits.

Rules 38 and 39 of the Federal Rules of Civil Procedure, prescribing the standards to be met by the District Courts in obedience to the Constitutional mandate the the right of trial by jury be "preserved . . . inviolate," specify that such trial must be granted or denied with reference to the character of the various *issues* presented by the action, and not with reference to an assessment of the character or form of the "action" as such. Those standards, are not met, in an action which presents both legal and equitable issues, by determining that more of the issues are equitable than are legal, and that therefore the "action" is equitable and a jury trial improper. Such a procedure clearly results in the improper denial of a jury trial upon the admittedly legal issues; and yet that is just what the Court of Appeals has done here.

The type of inquiry pursued by the Court of Appeals in the case at bar is squarely at odds with the scope of the inquiry pursued in each of the other Circuits. The courts of the other Circuits have consistently held that, in determining the right to trial by jury, it is the character of the various *issues* presented, and not the form or character of the whole case, which furnishes the definitive criterion. [*Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 2 Cir., 124 F. 2d 563, 565-566; *Reliance Life Ins. Co. v. Everglades Disc. Co.*, 5 Cir., 204 F. 2d 937, 942; *Canning v. Star Pub. Co.*, D. C. Del., 138 Fed. Supp. 843, 844-845; *Upjohn Co. v. Schwartz*, S. D. N. Y., 117 Fed. Supp. 292, 293; *Russell v. Laurel Music Corp.*, S. D. N. Y. 104 Fed. Supp. 815, 816; *Bendix Avia. Corp. v. Glass*, E. D. Pa., 81 Fed. Supp. 645, 646.]

The conflict among the Circuits created by the decision in the case at bar is strikingly illustrated by contrasting the ruling of the Court of Appeals here, denying a jury trial on *any* issue because the *case* is pleaded "in the form . . . of a code bill in equity" [R. 1827] with the definitive statement of the governing test described by the Court of Appeals for the Second Circuit:

> "But there are no longer equity cases and law cases, and it is the issues, not the form of case, which now determine the method of trial." [*Beaunit Mills, Inc. v. Eday Fabric Sales Corp., supra*, 124 F. 2d at 565-566.]

Had the Court of Appeals looked to the issues presented, rather than to the form of the case as a whole, it would have been readily apparent that the Complaint presented both legal issues [Point I, *supra*] and equitable issues [Point II, *supra*.] If the decisions of the other Circuits heretofore cited are to be followed, the necessary

result would be that the parties were entitled to a jury trial upon the legal issues and to trial by the court upon the equitable issues.[9]

The Court of Appeals has here pursued a rather surprising course of justifying the denial of petitioner's constitutional rights upon grounds, which, it candidly states, are abstruse and technical. Its willingness so to rest its decision is perhaps better understood in the light of its feeling, expressed with equal candor, that petitioner's appeal was apparently entitled to less than full consideration because "there was a perfectly fair and impartial trial" below before the Court without a jury, and that petitioner now contends that "the whole trial must be held again before a jury." [R. 1825-1826.]

To a point, of course, the statement of the Court of Appeals is a correct one. Indeed, there was *a* trial below, and no pertinent eivdence offered by petitioner was excluded. Indeed, the reversal of the judgment herein would result in the repetition of the entire trial before a jury. *But the repetitive process thus decried by the court is not of petitioner's making.* The necessity of a retrial herein was created by the error of the District Court in denying petitioner's timely demand for trial by a jury; and it would seem that petitioner is treated less than fairly when he is excoriated by the Court of Appeals for his unwillingness to acquiesce in the error and for his request for redress on this appeal.

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[9]To preserve inviolate the litigants' constitutional right to a jury trial requires that the legal issues be *first* tried to the jury, the court subsequently or concurrently determining the equitable issues according to the determination by the jury of the common factual questions. [*Leimer v. Woods*, 8 Cir., 196 F. 2d 828, 834.]

Actually, the erroneous order of the District Court placed petitioner in a dilemma to which the Court of Appeals appears to have been quite insensitive. Believing that the resolution of the legal issues presented by his Complaint was best made by a jury, he exercised his constitutional right thereto by timely demand therefor. When that demand was erroneously denied by the District Court, petitioner had no recourse but to proceed to trial before the court and hope for the best. The order of the District Court was not appealable as an interlocutory order. [*Zamore v. Goldblatt*, 2 Cir., 201 F. 2d 738; *In re Chappell & Co.*, 1 Cir., 201 F. 2d 343, 344.] The order was not subject to review by writ under Section 1651 of the Judicial Code. [*In re Chappell & Co., supra; Petsel v. Riley*, 8 Cir., 192 F. 2d 954, 955.] The only avenue of review available to petitioner was by assertion of the error upon appeal from an adverse final judgment. [*In re Previn*, 1 Cir., 204 F. 2d 417, 418-419.] And yet, having followed the only procedure available to him, petitioner has been here denied the full consideration of his appeal upon that very ground!

That petitioner, by reason of the error of the District Court, is thus given two bites at the apple, may well be true, but it was the error below, and not any voluntary act or plan of petitioner's, which created that situation. If the erroneous denial of a jury trial can be cured by compelling the litigants to submit to a "fair" court trial, then a matter of constitutional right to the litigant is effectively transformed into a matter of the unfettered discretion of the trial court. Such a holding, we submit, places entirely too low a price upon rights secured by the Constitution.

Actually, the erroneous denial of a timely demand for jury trial *compels* reversal of the judgment upon appeal, regardless of whether the court trial to which the appellant unwillingly submitted was scrupulously "fair" or not. [*Bowie v. Sorrell*, 4 Cir., 209 F. 2d 49, 51; *Barber v. Turbeville*, C. A. D. C., 218 F. 2d 34, 37; *Leimer v. Woods*, 8 Cir., 196 F. 2d 828, 833-837; See also, *Monolith Portland Midwest Co. v. R. F. C.*, 9 Cir., 240 F. 2d 444.]

The reason for this rule is strikingly emphasized by the facts of the case at bar. The evidence upon the crucial issues herein was directly and irreconcilably conflicting. Apart from the corrobative evidence supplied by other witnesses, the issues rested in the main upon wholly divergent testimony to the content and nature of oral conversations had between petitioner and Gunzburg, to which they alone testified. The determination of the entire cause required the factual determination whether petitioner or Gunzburg was telling the truth. The resolution of such a question, this Court has recognized, is inherently best resolved by a jury. [*Dimick v. Scheidt*, 293 U. S. 474, 485.] Petitioner chose to have the cause so resolved; and he was entitled to have his choice of the mode of trial respected and allowed.

It is fatally unrealistic, then, to argue as the Court of Appeals has argued, that petitioner has had a "fair trial" because the actual conduct of examination and cross-examination before the Court may have been without major error. As to petitioner, *the entire trial was unfair* because the determination of the cause was made in a mode of trial that was contrary to his deliberate choice and in contravention of his Constitutional right! A Constitutional mandate is not so lightly to be set aside.

Moreover, the Court of Appeals assumes too much when it attributes to petitioner the concession that the trial below was impeccably fair and free from error. To be sure, in order to focus his appeal, petitioner disclaimed any intention to seek reversal upon grounds of insufficiency of the evidence; and no errors occurring at the trial were asserted as independent grounds of reversal. But the inference therefrom that the trial was wholly free of error is completely unwarranted. The fact is that numerous errors in the admission of evidence, over petitioner's objections, did occur and occurred repeatedly. [R. 415, 1093-1103, 1173-1174, 1266-1279.]

These errors, in the main, consisted of the repeated admission of self-serving documents, written by Gunzburg and uncommunicated to petitioner, reciting Gunzburg's version of his agreement with petitioner. We have not claimed and we do not claim now that these errors constitute independent grounds of reversal. We cite them only in answer to the attribution to us by the Court of Appeals of a concession of the "fairness" of the trial below, which concession we never made. One error, however, is quite illustrative of the difference, pertinent here, to petitioner between a jury and a court trial.

Over the repeated and vigorous objections of petitioner, the District Court permitted defendants to introduce in evidence and to read substantial excerpts from a complaint *in another action as to which neither petitioner nor any of the defendants were parties*, in which complaint (which was subsequently dismissed), petitioner was *accused* of bribery, conspiracy and fraud in an independent transaction! [R. 1093-1103.] Presumably, having overruled petitioner's objections and having admitted this "evidence," the District Court must have given some consideration

thereto. The consideration of such irrelevant but seriously inflammatory and prejudicial accusations can hardly be squared with the concept of a "fair trial." We might well query whether, had petitioner's demand for jury trial been honored, such "evidence" would have even been offered, let alone admitted and considered, under the more closely confined and restricted rulings upon evidence which would have prevailed in a jury trial.

The result of this cumulation of errors by the Court of Appeals has been to justify the erroneous denial of a jury trial upon stated grounds which are wholly at variance with the standards pertinent thereto established and followed in the other Circuits. Additionally, the conflict among the Circuits thus presented arises in respect of the denial of a claim of constitutional right in an area of fundamental importance and concern to our judicial system. The issues thus raised, we submit, strikingly commend the exercise of this Court of its supervisory jurisdiction. [*Rex Trailer Co. v. United States*, 350 U. S. 148, 149; *Sanford v. Kepner*, 344 U. S. 13, 14; *Brooklyn Sav. Bank v. O'Neil*, 324 U. S. 697, 702.]

Conclusion.

Although this Court has not had occasion to rule upon the rights of the parties in a civil suit to a jury trial under Rules 38 and 39, it has on many occasions cautioned the lower courts upon the importance thereof as a matter of constitutional right, and has warned unceasingly of the dangers of erosion or diminution thereof by an unsympathetic judicial attitude. [See *Jacob v. City of New York*, 315 U. S. 752-753; *Dimick v. Scheidt*, 293 U. S. 474, 485.]

The Court of Appeals in the case at bar has, by a stilted and formalistic analysis under an erroneous theory of law, sanctioned the denial of that right to petitioner here, notwithstanding his timely effort to exercise it. It has done so by a process of reasoning which it candidly concedes to be "abstruse and technical" [R. 1827], drawn from "the books of [an] antique era." [R. 1828.] In the light of this candidly technical and formalistic approach, it is perhaps not inappropriate to recall the words of caution addressed to the lower courts by this Court more than twenty years ago:

> "With perhaps some exceptions trial by jury has always been, and still is, generally regarded as the normal and preferable method of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." [*Dimick v. Schiedt, supra.*]

If the right to jury trial is to be preserved in the manner directed by the Constitution and required by the letter and spirit of the Federal Rules, certiorari must here be granted and the judgment of the Court of Appeals must be reversed.

Respectfully submitted,

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Attorney for Petitioner.

HARRY L. GERSHON,

Of Counsel.

APPENDIX.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

George J. Schaefer, Appellant, vs. Milton J. Gunzburg, Natural Vision Corporation, Natural Sound Corporation, Natural Vision Theatre Equipment Corporation, Vera Gunzburg, Julian Gunzburg, Samuel Gunzburg and Rose Berch, Appellees. No. 15,208. Apr. 26, 1957.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, FEE and BARNES, Circuit Judges.

JAMES ALGER FEE, Circuit Judge:

There is but one question in this case. Plaintiff contends he was deprived of a jury trial, to which he was entitled in virtue of the Seventh Amendment to the federal Constitution. The cause was tried in the District Court upon specified issues by the judge alone, sitting without a jury. The judge entered findings of fact and conclusions of law in favor of defendants and against plaintiff, and dismissed the suit on the merits. Before this Court, plaintiff emphatically states:

"On this appeal, it is not contended that the evidence is insufficient to support the pertinent Findings of Fact or that such Findings of Fact are clearly erroneous."

Baldly, plaintiff contends that, although there was a perfectly fair and impartial trial, where he was allowed to present all the evidence he desired on the segregated issue, and where he lost, the whole trial must be held again before a jury. Since trial by jury is guaranteed by the federal Constitution, in "actions at law" we must perforce deal with the ancient distinction between such actions and

"suits in equity,"[1] notwithstanding the fact that, for purposes of pleading and procedure in the federal courts, the distinction has been nullified.

The parties are in agreement that this question can be determined at the threshold on the face of the complaint.

If this be the test, the trial court was exact in striking out the demand for jury trial, and the decree must be affirmed. Plaintiff set out a perfect bill in equity under code procedure or the modified chancery practice prevalent in this country for the last fifty years at least. To this, plaintiff appended the utterly misleading caption, "Complaint for Breach of Contract—Demand for Jury Trial," which is belied by practically every phrase in the bill and the prayer. The demand for jury trial at the conclusion is an anomaly. These factors could only lead to confusion.

There has been great debate in the settlement of the questions as to (1) whether the body of the complaint,

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[1]The Seventh Amendment preserves the right to jury trial which existed under the common law when the Amendment was adopted. Shields v. Thomas, 59 U. S. 253, 262; Dimick v. Schiedt, 293 U. S. 474, 476; Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 657. The prayer for relief was treated as a part of the bill, 1 Daniell's Chancery Pleading and Practice (1894), p. 315, and the prayer for relief was construed formalistically in determining in which forum the cause lay. See Lockhart v. Leeds, 195 U. S. 427, 436-437; Tayloe v. The Merchants' Fire Insurance Co. of Baltimore, 50 U. S. 390, 406.

The fact that there is a controversy regarding the function of the prayer under Rule 2, Federal Rules of Civil Procedure, need not concern us. Compare, Williams v. Collier, 32 F. Supp. 321, 324; Johnson v. Gardner, 9 Cir., 179 F. 2d 114, 117, cert. den., 339 U. S. 935; Ring v. Spina, 2 Cir., 166 F. 2d 546, 549, cert. den., 335 U. S. 813, with 2 Barron and Holtzoff, Federal Practice and Procedure (1950), § 873.

The intent of the pleader, sometimes noted modernly to be inferable from the prayer (see Ring v. Spina, *supra*), is not a proper test in this field. Here, the intent may have been ambiguous.

without the prayer, should be the basis for determination, or (2) whether the complaint should be considered as a whole.[2] Either method leads to exactly the same result in this case.

The body of the complaint pleads the existence of a partnership between Schaefer and Gunzburg. It sets up the acquisition of certain properties, rights and various assets, tangible and intangible, to be held for the benefit of the alleged partnership. It is pleaded in the form and style of a code bill in equity. It complains, partially by positive allegations but generally on information and belief, of violation of rights of plaintiff. But the whole tenor of the document is to treat the alleged partnership as a continuing and going concern where one of the partners is concealing and secreting the assets and acquisitions from the other. Specifically, the body of the complaint contains no allegation that the breach of the partnership relation "caused damage to plaintiff in the sum of $3,500,000.00."[3] Such an allegation is the traditional and accepted earmark of an action at law. It is alleged in the body of the complaint, "Forty-fourth: Plaintiff does not have any ade-

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[2]See Note 1, *supra*.

[3]In cases where equity exercises concurrent jurisdiction, it is postulated that there is a legal right and that a remedy at law of a similar nature is available. The decisive point is that the court of equity must determine that the legal remedy is inadequate. Pomeroy, Equity Jurisprudence (5th Ed., 1941), §§ 139, 231. The District Court here construed the complaint as a bill in equity and determined that the legal remedy was inadequate, as plaintiff alleged it to be.

In Bruckman v. Hollzer, 9 Cir., 152 F. 2d 730, the District Court had decided that a separate count stating a legal cause of action on that phase of the total controversy was adequate and granted a jury trial. This Court simply affirmed the action of the trial court.

quate remedy at law," which is the traditional and accepted earmark of a suit in equity.[4]

It may be observed that such reasoning is abstruse and technical. But the demand of plaintiff is technical. The matter can only be solved by a technical analysis of the complaint in the light of the distinction between law and equity. Since plaintiff has appealed to the sword of technicality, he might find a sword may deal blows as well as parry them.

Plaintiff insists that the prayer be not considered. There are expressions in the books, especially modernly, that the prayer is no part of the complaint. Under the federal rules, the prayer is usually of slight consequence, since the court is entitled to give whatever relief to which the plaintiff may be entitled.[5] The chancery courts acted similarly if the orator included a prayer with exactness, as plaintiff did here, that it be adjudged that Schaefer "shall have such other and further relief as shall be just and proper in the premises."[6]

Since this is a technical field, this Court must consider the prayer, as the books of that antique era say, "for the

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[4]In Johnson v. Fidelity and Casualty Company of New York, 8 Cir., 238 F. 2d 322, it was held that an allegation in a declaratory petition of the absence of remedy at law and a prayer for other and further relief as may be necessary did not bind a defendant who had a right to jury trial on some of the issues raised by the complaint. Compare, however, Arnstein v. Twentieth Century Fox Film Corporation, 3 F. R. D. 58, 59, where such an allegation was relied upon, *inter alia*, to determine the equitable nature of the pleading. Cf. Young v. Loew, 2 F. R. D. 351.

[5]It is to be noted, however, that Rule 54(c), Federal Rules of Civil Procedure, restricts the kind and amount of relief grantable by the court in a judgment on default. In such a case, an inquiry such as the trial court pursued here would be pertinent.

[6]Tayloe v. Merchants' Fire Insurance Co. of Baltimore, 50 U. S. 390, 405; Lockhart v. Leeds, 195 U. S. 427, 437.

purpose of characterizing the declaration or bill." The prayer of a declaration at law consisted of a "demand" for a specific sum in dollars as "damages." This complaint does not do so, but prays for damages as an incident of numerous forms of purely equitable relief, namely, that it be adjudged that (1) "Schaefer is a partner" "entitled to share equally" "all profits and proceeds and assets, including the goodwill and name, Natural Vision, of such partnership enterprise," (2) that he is "the true owner of one-half" of the stock of various corporations, (3) that the partnership and all these alleged corporations be adjudged dissolved and the assets of all be sold, (4) that Gunzburg "should account to" Schaefer, (5) that Gunzburg and other individuals and corporations are "trustees *ex maleficio* in respect to any and all assets," etc., "which have been wrongfully diverted to and received by each" and "shall render full accounting" therefor, (6) that such persons and corporations "restore and pay over to such Natural Vision partnership enterprise any and all assets, profits and all effects wrongfully diverted to and withheld from such Natural Vision partnership," (7) that "the properties and profits of this partnership enterprise, after payment of the partnership debts and liabilities, be divided equally between" plaintiff and Gunzburg, "according to their respective interests," (8) that interest shall be paid to plaintiff on "all sums found, upon such accountings, to be due and payable to plaintiff," (9) that Gunzburg "pay plaintiff damages in the sum of at least" $3,500,000.00 with interest from March 30, 1953, (10) that defendants be enjoined, pending trial and permanently thereafter, from disposing of the assets "of such Natural Vision partnership enterprise, including any secret gains," (11) that a receiver of the assets be appointed pending trial and thereafter "of such Natural Vision partnership enterprise,"

and, finally, (12) that plaintiff Schaefer "shall have such other and further relief as shall be just and proper in the premises."

It only remains for this Court to compliment counsel for plaintiff for this exposition of perfect mastery of the lost art of pleading in chancery.

There are certain other features upon which rulings should be made. Neither party is entirely disingenuous in the suggestion that the decision should be made on the face of the complaint. Each has another string to the bow. Plaintiff claims the court segregated legal issues alone and tried these, and therefore must have called a jury in accordance with his demand. Defendant, in addition, claims that, even if there were a right to trial on certain legal issues, plaintiff waived this right by later conduct.

The question of whether the prayer for relief can be used to characterize the nature of the complaint as legal or equitable has already been considered. A variation of the argument that the complaint may contain legal and equitable claims is now urged by plaintiff. It is contended that, if any legal causes of action were included, these must have been segregated and tried by jury. In certain cases, this principle has been applied. But, in the cases where chancery assumed jurisdiction because the main complaint required equitable relief, that tribunal traditionally awarded damages as incident thereto.[7] This rule has not changed. As pointed out above, the damages prayed for were incidental.

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[7]Camp v. Boyd, 229 U. S. 530, 551-552; 1 Pomeroy, Equity Jurisprudence (5th Ed., 1941), § 231.

In cases which arise from a petition for a declaration of rights, the plaintiff cannot force a defendant to try a cause of action at law which he possesses before a court without a jury simply because the petition asks equitable relief.[8] In the former practice in equity, the court could not have tried such issues of law as it can now. Such actions of law might have been enjoined temporarily or permanently. But, if tried, these must necessarily have been tried by a jury in another court. The same principle is recognized today, but the one court may now dispose of legal and equitable causes. Therefore, if a defendant has such a legal right, the court, after the equitable issues are disposed of, proceeds to trial of the legal issues with a jury, or perhaps tries both simultaneously.

Likewise, a joinder of legal claims with equitable claims will not deprive plaintiff of a right to trial of the former by jury. But there are many situations such as we have here, where an issue such as the existence of a partnership might lie at the basis of an action at law for damages or a suit for equitable relief, such as injunction, receivership and accounting, to the partnership or reclamation of the partnership properly from one of the alleged partners.

This Court is firmly committed to the doctrine that the constitutional right to jury trial should not be eroded by a flow of decisions giving force to dubious waivers and rationalized construction of the Federal Rules of Civil Procedure.[9] However, it is not the purpose to expand the strict concept of a law action by rationalization beyond that covered by the constitutional guaranty.

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[8]Pacific Indemnity Co. v. McDonald, 9 Cir., 107 F. 2d 446, 131 A. L. R. 208.

[9]Bruckman v. Holtzer, 9 Cir., 152 F. 2d 730; United Press Associations v. Charles, 9 Cir., No. 14,863, filed March 1, 1957.

The technician who drew the complaint in this case had the ability to plead a common law action for specific damages for repudiation of partnership obligation.[10] Instead, he pleaded a bill in chancery, in which all damages could be assessed and traditionally have been assessed by the Chancellor as an incident to the equitable remedy.

The trial court segregated the issues and directed trial as to the relationship between plaintiff and Gunzburg and the existence and nature of the agreement, if any, between them. Plaintiff says these are issues at law. But, obviously, the court was bound to determine such issue in order to find whether there was basis for consideration of the issues concerning injunction, receivership, trustee *ex maleficio*, accounting for the partnership property and the equitable defense of unclean hands.[11]

In effect, if the claim of plaintiff is correct, there could never have been a suit in equity for the relief asked for in this complaint without a jury trial upon the question of whether there was a partnership or not. We hold the judge had the power to determine these issues without a

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[10]See, stating exceptions to the general rule that a partner may not sue a co-partner except in equity. Laughlin v. Haberfelde, 72 C. A. 2d 780; Wilson v. Brown, 96 C. A. 140, 143; Barlin v. Barlin, 145 A. C. A. 456 (joint venture).

[11]A well recognized branch of equity jurisdiction is denominated "concurrent." This embraces causes where the primary right, the estate, title or interest, which is the foundation of the suit is legal and some remedy of the same general nature as that given by equity can be obtained by law. Once equity acquires jurisdiction where an alleged partnership is involved, that basic issue must be there determined and a decree will be entered for final winding up and settlement of all partnership matters. The most frequent exercises of concurrent jurisdiction by equity are those which involve accounting and discovery as to alleged hidden assets. Each of these elements is involved here.

jury, for the purpose of giving plaintiff the equitable relief demanded if a partnership were found to exist.[12]

Defendant says that plaintiff was not entitled to jury trial because of waiver and because the defense of "unclean hands" was proven by the testimony of plaintiff himself. The cases show that, once the right of jury trial is claimed in a law action, in accordance with the Rule,[13] denial thereof is ground for reversal.[14] Without weakening these holdings, here the actions of plaintiff laid a procedural trap for the trial judge. This is not intended as a reflection upon counsel, who has acted courteously and ethically throughout.

However, about a year after the court had segregated the issues for trial and had struck the demand for jury trial, plaintiff filed an amended complaint for the purpose, then stated and still maintained, of clarifying the original complaint.[15] In this document, the allegation that "Plain-

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[12]It has also been objected, that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.

"But it by no means follows from this, that a court of chancery will not entertain jurisdiction. * * * No doubt, a count could have been framed upon the agreement to insure, so as to have maintained the action at law. * * * The party, therefore, had a right to resort to a court of equity * * * and being properly in that court * * * it is according to the established course of proceeding * * * to proceed and give such final relief as the circumstances of the case demand." Tayloe v. The Merchants' Fire Insurance Co. of Baltimore, 50 U. S. 390, 405.

[13]Rule 38(b), Federal Rules of Civil Procedure.

[14]Monolith Portland Midwest Co. v. Reconstruction Finance Corporation, 9 Cir., 240 F. 2d 444; Dickinson v. General Accident Fire & Life Assurance Corporation, 9 Cir., 147 F. 2d 396; Bowie v. Sorrell, 4 Cir., 209 F. 2d 49.

[15]"The amended complaint also contained a common count for the reasonable value of services rendered, which is not in issue on this appeal." Appellant's opening brief, page 8.

tiff has no adequate remedy at law" was repeated, but the demand for jury trial, stricken out of the original complaint by the court, was not renewed. At the trial, plaintiff neither renewed his demand nor objected to trial by the judge of the segregated issues. Under the circumstances, we believe not that there was a waiver, but that plaintiff led his opponents and the trial judge to believe he acquiesced in the interpretation placed upon his initial pleading. He went to trial. He did not again raise the point there. He lost. We hold that the original complaint contained only the elements of a bill in chancery and that the trial court was correct in denying trial by jury.

Judgment of dismissal on the merits is affirmed.

(Endorsed:) Opinion. Filed Apr. 26, 1957.

Paul P. O'Brien, Clerk.